IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1048 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SINDHI DAFER KASAM RAHIM SUMARA

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 1048 of 1999

MR RC JANI for Petitioner No. 1-4

MR. CHAUHAN, APP for Respondent No. 1

CORAM : MR.JUSTICE K.M.MEHTA

Date of decision: 5 / 9 /2003

C.A.V. JUDGEMENT

Sindhi Dafer Kasam Rahim Sumara, accused No. 1, Sindhi Dafer Hussain Usmanbhai, accused No. 2, Sindhi Dafer Sarif @ Abdul Allarakha, accused No. 3, and Sindhi

Dafer Kadu @ Abdul Mohammad, accused No. 4, all appellants, original accused, have filed this appeal under Section 374 of the Criminal Procedure Code, against the order dated 29.9.1999 passed by the learned Additional Sessions Judge, Mehsana, in Sessions Case No. 71 of 1999.

2. The facts giving rise to this appeal are as under:

2.1 It is the case of the prosecution that on 26.12.1998 at about 6.45 p.m. when the complainant Patel Shivrambhai Jethabhai was passing through Mal Godown Road, near Mathura Society, the accused caught hold the complainant. It is the case of the prosecution that the complainant Patel Shivrambhai Jethabhai (hereinafter referred to as "the complainant") was going along with one small bag/packet. The said bag depicts name of Chaudhary Tea Bhandar, Palanpur. It has been stated that he was carrying about Rs. 46,000/- (Rupees forty six thousand) in cash in the said bag. It has been stated that he has received Rs. 46,000/- (Rupees forty six thousand) out of sale of tea. While he was travelling all the accused came near the accused and accused Nos. 1, 2 and 4 got hold of the complainant and accused No. 3 Sindhi Dafer Sharif alias Choki Allarakha had taken out a knife from his pocket. All the four accused thereafter threatened the complainant to deliver the rexin bag which he was carrying and he was given threat that if he did not give the said bag/packet the accused might injure the complainant. In view of fear, the complainant handed over the said bag containing Rs. 46,000/- (Rupees forty six thousand) to the accused and after the accused received the said bag, they left the place. In view of the same, a complaint was filed on 26.12.1998 by the complainant which is produced at Exh. 12 on page 55. In the said complaint it has been stated by the complainant that he has received about Rs. 49,487/- (Rupees forty nine thousand four hundred eighty seven) out of sale of 28 kgs. of tea on that day and out of that he carried with him Rs. 46,000/- (Rupees forty six thousand) in the said bag. He has also stated that Rs. 46,000/- (Rupees forty six thousand) contains twenty notes of Rs. 500/each, three bundles of Rs. 100/-, one bundle of Rs. 50/-. He stated that Rs. 46,000/- (Rupees forty six thousand) was put in small rexin bag which was blue and on the same it was written as "Chaudhary Tea Depot. He further stated that when he was travelling on the Mehsana road which I have stated earlier, three accused caught hold of the complainant and fourth accused shown a knife and ultimately, in view of the threat, the complainant

had handed over the said packet to the accused. He tried to enquire the said accused but he could not obtain the whereabouts of the said accused but ultimately he filed complaint before the Police Officer, Mehsana City Police Station stating about the incident.

2.2 In view of the same, ultimately, the accused were arrested. Trial conducted and at the trial the prosecution examined Shivrambhai Jethidas Patel, PW-1, at Exh. 11, on page 51. The prosecution also examined Kailasdhan Moredhan Ghadvi, PW-10, Exh. 23, P.S.O. Mehsana Police Station, Bhavansinh Ramsinh Rathod, PW-11, Exh. 25, Mamlatdar and Executive Magistrate before whom identification parade was conducted; Gangasagar Mukhlalsinh Sinh, PW-12, Exh. 28, page 89, In-Charge Police Inspector of Mehsana City Police Station who has registered the complaint and Mahendrabhai Shankerbhai Chaudhary, PW-13, Police Inspector, Mehsana City Police Station who has conducted the investigation.

2.3 It may be noted that when the accused were caught and identification parade was conducted in presence of the Mamlatdar and Executive Magistrate, PW-11, in the presence of panchas Bapusinh Ajitsinh Zala and Rajnikant Abdulla Vora, PW-8, page 71 in which the complainant has identified the accused.

2.4 It may be noted that panchnama of the place of accident was also prepared at Exh. 29 in presence of the panchas Ambalal Joytram Patel and Bhagwanbhai Ishwardas Patel. The prosecution ha also tried to prepare panchnama of accused No. 1 Sindhi Dafer Kasam Rahim Sumra, accused No. 2 Sindhi Dafer Hussain Usmanbhai showing their physical conditions and in presence of two panchans Chamansinh Nanuba Zala and Ahmadmiya Nathumiya Saiyad the prosecution also prepared panchnama at Exh. 32 of accused No. 3 Allarakha Sindhi and accused No. 4 Abdul Mohammad Sindhi. Their physical condition has also been identified.

2.5 The prosecution has tried to prove the case by preparing panchnama of place of incident at Exh.. 33, page 100 in presence of panchas Atmaram Sakalchand Kadia and Jashwantlal Prahladbhai Modi. They have stated in presence of all the accused the place of incident and stated that at that time all the four accused have committed robbery of Rs. 46,000/- (Rupees forty six thousand) from the complainant. The said panchnama was carried out on 4.1.1999. The accused have shown the place of incident in this behalf. The prosecution has also produced panchnama of recovery of muddamal at Exh.

34, page 102 of Rs. 39,800/- (Rupees thirty nine thousand eight hundred) in presence of panchas Hasmukhbhai Chunilal Suthar and Deepakkumar Vasudev Joshi. Hasmukhbhai Chunilal Suthar, PW-4, has been examined at Exh. 15, page 62, for which I will make necessary reference while discussing the oral evidence. The said panchnama shows that about Rs. 39,800/- (Rupees thirty nine thousand eight hundred) was recovered along with the packet which was carried by the complainant. The said packet has been described by the complainant and police also got Rs. 39,800/- (Rupees thirty nine thousand eight hundred). The prosecution further produced a panchnama regarding recovery of muddamal of Rs. 2000/- (Rupees two thousand) at Exh. 35, page 104 wherein Rs. 2000/- (Rupees two thousand) has been found out during that panchnama and in the said panchnama contained 20 notes of Rs. 100/-. The said panchnama was prepared in the presence of panchas Dilipkumar Babulal Darji and Prakashbhai Haribhai Chaudhary. Prakashbhai Haribhai Chaudhary, PW-5, has been examined at Exh. 17, page 65.

2.6 The prosecution has also proved the case by producing panchnama at Exh. 36, page 106, wherein Rs. 1500/- has been recovered out of Rs. 46,000/- (Rupees forty six thousand). The said panchnama was prepared in presence of Jayeshkumar Kanubhai Nayi and Ranchhodji M. Thakor. Shri Jayeshkumar Kanubhai Nayi has been examined as PW-6 at Exh. 18, page 67. The prosecution has further produced panchnama of recovery of muddamal of Rs. 1500/- (Rupees one thousand five hundred) at Exh. 37, page 108. The said panchnama was prepared in presence of Rajendrabharti Ganpatbharti Gosai and Nanalal Ranchhod Nayi. Shri Rajendraharti Ganpatbharti Gosai has been examined as PW-7, at Exh. 19, page 69.

2.7 The prosecution has also tried to prove the case by producing panchnama of recovery of muddamal article knife at Exh. 38, page 10. By the said panchnama the knife which was subject matter in connection with the offence has been recovered. The panchnama was prepared in presence of Dilipkumar Ranchhodbhai Prajapati and Gandalal Khodidas Prajapati. Out of that Dilipkumar Ranchhodbhai Prajapati has been examined as PW-9, Exh. 21, page 73.

2.8 Over and above the aforesaid documentary evidence the prosecution has also examined the following oral evidence. Atmaram Sakalchand Kadia, PW-2, at Exh. 13, page 58 has been examined in connection with recovery of chappel, in connection with panch at Exh. 33, page 100.

The prosecution has also examined Jaswantbhai Prahladbhai Modi, PW-3, at Exh. 14, page 60. The prosecution has also examined Hasmukhbhai Chunilal Suthar, PW-4, at Exh. 15, page 62 regarding recovery of muddamal of sum of Rs. 39,800/- (Rupees thirty nine thousand eight hundred) and the packet. The prosecution also examined Prakashbhai Haribhai Chaudhary, PW-5, at Exh. 17, page 65 in connection with muddamal of sum of Rs. 2000/- (Rupees two thousand). Shri Jayeshkumar Kanubhai Nayi, PW-6, has been examined at Exh. 18, page 67, in connection with recovery of a sum of Rs. 1500/- (Rupees one thousand five hundred). Shri Rajendrabharti Ganpatbharti Gosai, PW-7, has been examined in connection with muddamal of sum of Rs. 1500/- (Rupees one thousand five hundred) at Exh. 19, page 69. Shri Rajnikant Chandulal Vora, PW-8, panch of identification period, at Exh. 20, page 71 has been examined. Shri Dilipkumar Ranchhodhai Prajapati, PW-9, has been examined at Exh. 21, page 73, in connection with panchnama of the recovery of muddamal article, knife.

3. Mr. R.C. Jani, learned counsel for the accused has stated that in this case all the accused have been charged under Section 392 of the India Penal Code which provides punishment for robbery. He has submitted that robbery has been defined under Section 390 of the I.P.C. which provides that when theft is robbery. Theft is "robbery", if, in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, for that end, voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt, or of instant wrongful restraint. Section 392 of the I.P.C. provides punishment for robbery.

4. The learned counsel for the accused submitted that offence has been committed under Section 392 read with Section 114 of the I.P.C. He has invited my attention to charge-sheet framed at Exh. 3 on page 10 of the paper-book which more or less contained the facts stated by the complainant in complaint. The charge-sheet was filed on 9.8.1999 under Section 228 of the Cr.P.C. against all the four accused under Section 392, 397 i.e. robbery or dacoity with attempt to cause death or grievous hurt and Section 115 of the I.P.C. As stated above, in order to prove the case against the accused, the prosecution has mainly relied on the evidence of Shivrambhai Jethidas Patel, PW-1, complainant, identification parade held therein and evidence of Bhavansinh Ramsinh Rathod, PW-11, Mamlatdar and Executive

Magistrate and also the evidence of Gangasagar Mukhlalsinh Sinh, PW-12, Exh. 28, page 89, In-Charge Police Inspector of Mehsana City Police Station and Mahendrabhai Shankerbhai Chaudhary, PW-13, Police Inspector, Mehsana City Police Station.

4.1 The learned counsel has stated that originally the complaint was filed by the complainant Shivrambhai Jethidas Patel in which it is alleged that Rs. 46,000/(Rupees forty six thousand) has been taken away by the accused by threatening the complainant at the point of knife.

4.2 The learned counsel submitted that the incident occurred on 26.12.1998 at abut 6.45 p.m. At that time three accused caught hold of the complainant from behind and the fourth accused had shown knife against the complainant and out of fear the complainant had left the packet containing Rs. 46,000/- (Rupees forty six thousand) and all the accused had taken away the said packet containing Rs. 46,000/- (Rupees forty six thousand). The learned counsel for the accused submitted that the incident occurred at about 6.45 p.m. in the month of December and the complainant could not recognise the accused as it was the time of twilight and as there was darkness at that time, the identification parade is doubted and the case of the complainant showing the accused in the identification parade cannot be believed. Similarly, while corroborating the complaint of PW-1, Shivrambhai Jethidas Patel at Exh. 1 on page 51, the prosecution has mainly relied on evidence of Shivrambhai J. Patel, the complainant, the facts which have been stated in the complaint. He has produced the complaint and also thereafter identified the muddamal article packet in which Rs. 46,000/- (Rupees forty six thousand) were put. He has also stated that on 7.1.1999 he has identified all the accused during identification parade and he has stated that panchnama of the packet, panchnama of knife and panchnama of amount recovered have also been verified by him. He has also identified the packet which contained the sum of Rs. 46,000/- (Rupees forty six thousand). The learned counsel for the accused has stated that this Court may not rely upon the evidence of Shivrambhai Jethidas Patel who himself is a complainant.

4.3 It may be noted that he was cross-examined at length. However, the deposition given by him has not been shaken.

5. The prosecution has examined the case of Bhavansinh Ramsinh Rathod, PW-11, at Exh. 25, on page 78

who has stated that he was working as Mamlatdar and Executive Magistrate on 7.1.1999 and it was decided to arrangement an identification parade on that day. He has stated that identification parade was held at 2.30 p.m. and he has taken enough care to see that all the accused were not recognised by the complainant earlier. He has also called panchas in his chamber in connection with identification parade. He had called about 16 people in all and thereafter all the four accused were called and their faces were covered with cloth. Panchas were also called. The room in which Shivrambhai J. Patel was sitting was closed. Windows were closed so that he cannot be able to see the accused. Accused No. 1 was put between persons Nos. 4 and 5. Accused No. 2 was placed between persons Nos. 14 and 15 and accused No. 3 was put between persons Nos. 8 and 9. Accused Nos. 4 was put between persons Nos. 9 and 10. After all the persons have come, the complainant was called. In identification parade there were 20 persons in the room including the four accused. The complainant thereafter identified accused No. 3 Sindhi Dafer Sarif @ Abdul Allarakha, accused No. 1 Sindhi Dafer Kasam Rahim Sumara, accused No. 2 Sindhi Dafer Hussain Usmanbhai and accused No. 4 Sindhi Dafer Kadu @ Abdul Mohammad. Panchnama was also prepared accordingly. In view of the panchnama all the 16 persons were called from the public and their signatures were taken and panchnama has also been produced and the same has been proved. The accused have tried to cross-examine the said witnesses. However, nothing substantial has been taken out by the accused.

5.1 The prosecution has also examined Gangasagar M. Sinh, PW-12, Exh. 28, page 89. He was in-charge Police Inspector of City Police Station who has registered the complaint at Exh. 12 and offence has been registered against all the four accused by him. He has also tried to prove panchnama regarding the place of incident. The accused have not been able to cross examine effectively the said witnesses.

5.2 The prosecution has examined Mahendrabhai Shankarbhai Chaudhary, PW-13, at Exh. 30. He was working as Police Inspector in City Police Station on 26.12.1998. He has investigated the said complaint. He has tried to prove the panchnama at Exh. 31 in connection with the accused and also tried to prove panchnama at Exh. 32 regarding showing physical presence of accused Nos. 3 and 4. He has also tried to prove panchnama at Exh. 33 regarding the place of incident and also tried to prove panchnama at Exh. 34 regarding recovery of muddamal purse (packet) amounting to Rs.

39,800/- (Rupees thirty nine thousand eight hundred). He has also tried to prove panchnama at Exh. 35 regarding recovery of muddamal of Rs. 2000/- (Rupees two thousand), panchnama at Exh. 36 regarding recovery of muddamal of Rs. 1,500/- (Rupees one thousand five hundred), panchnama at Exh. 37 regarding recovery of muddamal Rs. 1,500/- (Rupees one thousand five hundred). He has also tried to prove panchnama at Exh. 38 regarding recovery of muddamal article knife. Though he was cross-examined by the accused, he has not been effectively cross-examined in this regard.

5.3 The learned counsel for the accused has stated that this Court ought not to have believed the evidence of the complainant Shivrambhai Jethidas Patel, Bhavansinh Ramsinh Rathod, PW-11, Gangasagar M. Sinh, PW-12 and Mahendrabhai Shankerbhai Chaudhary, PI, Mehsana City Police Station, PW-13 because all these persons are interested persons in connection with proving the same and therefore they are not independent witnesses.

5.4 The learned counsel for the accused has submitted that the prosecution has tried to produce the panch witness Atmaram Sakalchand Kadia, PW-2 A , regarding recovery of chappel. He has turned hostile and therefore his evidence ought not to have been believed. Another panch witness Jaswantbhai P. Modi, PW-3, at Exh. 14 has been examined. He has also been declared as hostile and his evidence ought not have been relied upon in this behalf. Another witness Prakashbhai Haribhai Chaudhary, PW-5, at Exh. 17 has been examined regarding recovery of muddamal sum of Rs. 39,800/- (Rupees thirty nine thousand eight hundred). He has also been declared as hostile and therefore the Court ought not to have relied on his evidence. The prosecution has also produced Jayeshkumar Kanubhai Nayi, PW-6, a panch, regarding recovery of muddamal sum of Rs. 1,500/- (Rupees one thousand five hundred). He has also been declared as hostile. Therefore, his evidence ought not to have been relied on by this Court. Another panch witness Rajendrabharti G. Gosai, PW-7, at Exh. 19, on page 69 regarding recovery of muddamal sum of Rs. 1,500/(Rupees one thousand five hundred). He has also turned hostile and his evidence ought not to have been believed.

5.5 The prosecution has also examined panch witness Rajnikant Chandulal Vora, PW-8, at Exh. 20, on page 71 in connection with identification parade. However, he has also been declared as hostile.

5.6 The prosecution has also examined another panch

Dilipkumar Ranchhodbhai Prajapati, PW-9, at Exh. 21, in connection with recovery of muddamal knife but he has also turned hostile.

5.7 The learned counsel for the accused has stated that in this case except the evidence of the complainant shivrambhai J. Patel, PW-1, Bhavansinh R. Rathod, PW-11, Gangasagar M. Sinh, PW-12, and Mahendrabhai Shankarbhai Chaudhary, PW-13, all other witnesses have been declared as hostile and therefore this Court ought not to have believed the case of the prosecution and the accused are therefore required to be acquitted.

5.8 The learned counsel for the accused has stated that in this case three persons have caught hold of the complainant from back side and one of the accused had shown knife and therefore the identification parade is absolutely contrary to first information report and and not at all justified at any cost. He further submitted that the age of the accused which are mentioned to be between 30 and 32 but at the time of identification the persons which are shown to the complainant are from the age group of 19 to 21 years which can be verified from page 84 of the paper book and therefore identification parade has not been properly done. There is no eye witness except the complainant. All other witnesses have turned hostile and therefore this Court ought not to have relied on the prosecution case.

5.9 The learned counsel for the accused has relied on the judgement in the case of SANTOKH SINGH VS. IZHAR HUSSAIN reported in AIR 1973 SC 2190 and after relying on the said judgement he has stated that looking to the procedure which is adopted in the matter, it is not supporting the case of the prosecution. He has submitted that it is not substantive evidence and cannot only be used as a corroboration of statement in Court. In the present case except the evidence of identification parade, there is nothing on record which can justify the conviction. He has also relied on the judgement of the Hon'ble Supreme Court in the case of DELHI ADMINISTRATION VS. BALAKRISHAN reported in AIR 1972 SC 3 in which case the identification parade was carried out at a later stage and therefore the Hon'ble Supreme Court has given benefit of doubt in this behalf. He has further relied on the judgement of the Hon'ble Supreme Court in the case of SHAIKH UMAR AHMED SHAIKH VS. STATE OF MAHARASHTRA reported in AIR 1998 SC 1922. After relying on the said judgement, he has submitted that the Hon'ble Supreme Court has set aside the conviction by observing that there is strong possibilities of accused having been

shown to the witness before the identification parade, conviction however recorded by relying on the identification of accused by the said witness in the Court - not justified when the accused were already shown to the witness and therefore identification by the Court by the said witness was meaningless.

5.10 He has further stated that in the present case when the persons for identification were called at the office and when they were passing through staircase, the complainant was very well there and also pointed out in the cross-examination that there are three doors in the room whereby so-called accused can be identified in the presence of police.

5.11 He has further relied on the decision of the Hon'ble Supreme Court in the case of BUDHSEN VS. STATE OF U.P. reported in AIR 1970 SC 1321 and stated that substantive evidence of the witness is a statement made in the Court and the evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. It is also observed that they must take intelligent interest in the proceedings bearing in mind two considerations. He has relied on the judgement of the Hon'ble Supreme Court in the case of KIRPAL SINGH VS. STATE OF UTTAR PRADESH reported in AIR 1965 SC 712. Relying on the said judgement he has submitted that it was the duty of the Magistrate to examine the witness to actual commission of offence because they are not produced. Without considering whether it is necessary in the interest of justice to examine such witness fails in the discharge of the duty. In the present case also the learned Magistrate has not tried to get any material from the witness because they all became hostile and not supported the case and the version of the prosecution and therefore ultimately the benefit of doubt may be given to the accused. He has further relied on the judgement of the Hon'ble Supreme Court in the case of WAKIL SINGH VS. STATE OF BIHAR reported in AIR 1981 SC 1392. He submitted that in the present case the incident occurred at about 7.00 p.m. in the month of December and therefore the complainant could not have seen properly the accused and therefore the identification by the complainant cannot be relied on which has been relied on by the learned Sessions. Therefore, the learned Sessions Judge is not justified in convicting the accused.

5.12 Regarding recovery of part of currency notes, as there is difference and dispute regarding actual currency notes which has been stated by the complainant and which

are recovered subsequently and therefore the accused should be given benefit of doubt. He has relied on the decision of the Bombay High Court in the case of SAYED MOHAMMED OWAIS VS. STATE OF MAHARASHTRA reported in 2003 Cri. L. J. 303 (Bom.).

5.13 The learned counsel has further stated that the knife which is the muddamal is not identified by the complainant and therefore benefit of doubt is to be given to the accused.

5.14 The learned counsel has further submitted that in this case only hired persons were got and the age group of the accused and the persons who are called in identification parade, there was material difference. The prosecution ought to have mixed identical persons in identification parade and therefore identification parade is not properly held in this behalf.

6. On the other hand Mr. Chauhan, learned A.P.P., has tried to support the reasoning of the learned trial Judge. He has stated that the complaint at Exh. 12, on page 55, evidence of Bhavansinh R. Rathod, Mamlatdar and Executive Magistrate, PW-11, at Exh. 25, page 78, Gangasagar M. Sinh, In-Charge Police Inspector, Mehsana City Police Station, PW-12, at Exh. 28, on page 89, Mahendrabhai Shankarbhai Chaudhary, Police Inspector, Mehsana City Police Station, PW-13, at Exh. 30, on page 93, clearly proved the case of the prosecution. He has stated that the identification parade was held and the complainant has been able to identify all the accused. He submitted that it is no doubt true that incident is occurred at about 7.00 p.m. in the month of December but when the accused were near the complainant and when they caught hold of the complainant and once of the accused had shown knife, there is possibility that the complainant could see all the accused and that during identification parade, the complainant could identify the accused because at 7.00 p.m. it is not that much dark by which the complainant could not identify the accused. He submitted that the case of the prosecution is very probable and justified. He submitted that identification parade has been properly held by the Mamlatdar and Executive Magistrate and the case of the prosecution has been further proved by two police officers. Merely because they are police officers, it cannot be said that they are interested persons. In fact, they have no interest in the case of the complainant. Though they are not eye witnesses but nonetheless they are not interested witnesses who have no interest in connection with offence committed by the accused in this behalf and they have no

interest in the matter of the complainant. They have not related to the complainant. They are independent Government servant police officers and therefore this Court must believe their evidence in this behalf.

6.1 The learned counsel has further submitted that it is no doubt true that some of the panchas have turned hostile but nonetheless the prosecution has produced panchnama of identification parade at Exh. 27, panchnama of place of incident at Exh. 29 on page 91, panchnama of accused at Exh. 31, panchnama of accused at Exh. 32, panchnama of accused at Exh. 33, panchnama of recovery of muddamal packet containing Rs. 39,800/- (Rupees thirty nine thousand eight hundred) at Exh. 34, panchnama of recovery of muddamal of Rs. 2000/- (Rupees two thousand) at Exh. 35, panchnama of recovery of Rs. 1500/- (Rupees one thousand five hundred) at Exh. 36, panchnama of recovery of Rs. 1500/- (Rupees one thousand five hundred) at Exh. 37, panchnama of muddamal article knife at Exh. 38. All these documents duly support the case of the prosecution that accused have taken away Rs. 46,000/- (Rupees forty six thousand) from the complainant and substantial amount has been recovered from the accused. He submitted that the case of the accused that there is no tally of the number of notes but complainant may not be remembered the entire notes of Rs. 46,000/(Rupees forty six thousand) and if there is a marginal error in the number of notes the same can be condoned in this behalf. This is not a case where the prosecution has to prove the exact number of notes. Broadly, the prosecution has been able to show that the accused have taken away Rs. 46,000/- (Rupees forty six thousand) and out of the said sum of Rs. 46,000/(Rupees forty six thousand) about Rs. 44,000/- (Rupees forty six thousand) has been recovered. This shows that the prosecution has been able to prove the case. It may happen that the accused might have spent Rs. 2000/(Rupees two thousand) for their own benefits.

7. I have considered the case of the prosecution and also the evidence in this regard. I have considered the decision cited by Mr. Jani, learned counsel for the accused as well as the submission of Mr. Chauhan, learned A.P.P. on behalf of the prosecution. The prosecution has been able to prove their case in the light of the evidence of Shivrambhai Jethidas Patel, PW-1, complainant, Bhavansinh R. Rathod, PW-1, Mamlatdar and Executive Magistrate, Gangasagar M. Sinh, In-Charge Police Inspector, Mehsana City Police Station, PW-12 and Mahendrabhai S. Chaudhary, Police Inspector, PW-13. The prosecution has also been able to prove the case by

various panchnamas. In fact, a sum of Rs. 44,000/(Rupees forty four thousand) has been recovered and the packet has also been recovered. The prosecution has also been able to prove their case by recovery of muddamal article knife also.

7.1 I have considered the case of the prosecution and evidence in this regard. I have also considered the evidence of Shivrambhai Jethidas Patel, PW-1 at Exh. 11; Kailashdhan Moredhan Ghadvi, PW-10, at Exh. 23; P.S.O. Mehsana Police Station, Bhavansinh Ramsinh Rathod, PW-11, at Exh. 25; Mamlatdar and Executive Magistrate before whom identification parade was conducted; Gangasagar Mukhlalsinh Sinh, PW-12, Exh. 28, In-Charge Police Inspector of Mehsana city Police Station who has registered the complaint and Mahendrabhai Shankerbhai Chaudhary, PW-13, Police Inspector, Mehsana City Police Station who has conducted the investigation. In this case identification parade was conducted in presence of the Mamlatdar and Executive Magistrate, PW-11 (Exh. 25), who has been examined and he has correctly proved the identification parade in this regard. I have also considered panchnama of the place of incident at Exh. 33. I have also considered panchnamas regarding recovery of muddamal at Exh. 34 of Rs. 39,800/- (Rupees thirty nine thousand eight hundred), recovery of muddamal at Exh. 35 of Rs. 2000/- (Rupees two thousand), recovery of muddamal of Rs. 1500/- (Rupees one thousand five hundred) at Exh. 36. I have also considered the evidence of Hasmukhbhai Chunilal Suthar at Exh. 15. I have also considered the oral evidence of Rajendrabharti Ganpatbharti Gosai, PW-7, at Exh. 19. I have also considered panchnamas regarding recovery of muddamal wherein Rs. 2000/- (Rupees two thousand) and Rs. 1500/(Rupees one thousand five hundred) have been recovered.

7.2 In this case the incident occurred in the evening at about 7.00 p.m. where three accused have caught hold of the complainant and fourth accused has shown knife and they took away the packet containing Rs. 46,000/- (Rupees forty six thousand). The complainant has filed complaint and the accused were duly identified and identification parade has been proved and amount has been recovered. Even the knife has been recovered. All these clearly show that the prosecution has been able to prove the case against the accused. I have also considered the arguments made by Mr. R.C. Jani, learned counsel for the accused and in view of the above I do not accept the contention of the learned counsel for the accused. On the other hand, the contention of the learned A.P.P. for

the respondent Mr. Chauhan is accepted. The evidence led by the prosecution in this regard is also accepted.

8. In view of the above, the appeal is dismissed with no order as to costs. The judgement of the trial court convicting the accused is confirmed.

9. I am told that the accused are in jail. The punishment awarded by the learned trial Judge is confirmed. The fine of Rs. 10,000/- (Rupees ten thousand) imposed by the learned trial Judge and in default of making the same, simple imprisonment for six months awarded by the learned trial Judge is also confirmed.

(K.M. MEHTA, J)

(pkn)